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**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Implementation of the Pay Telephone) CC Docket No. 96-128
Reclassification and Compensation)
Provisions of the)
Telecommunications Act of the 1996)

**REPLY COMMENTS OF TELCO COMMUNICATIONS GROUP, INC.
AND EXCEL TELECOMMUNICATIONS ON THEIR APPLICATIONS FOR REVIEW**

Telco Communications Group, Inc., on behalf of its operating subsidiaries ("Telco"), and Excel Telecommunications, Inc. ("Excel"), by their undersigned counsel and pursuant to the Federal Communications Commission's ("Commission") Public Notice released July 2, 1997, respectfully submit consolidated Reply Comments in support of their Applications for Review of the Common Carrier Bureau's ("Bureau") April 4, 1997,¹ and April 15, 1997,² Waiver Orders, which granted the LECs waivers of various requirements of the Payphone Orders,³ while still allowing the LECs to receive interim compensation beginning on April 15, 1997.

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA-678 (rel. Apr. 4, 1997).

² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Order, DA 97-805 (rel. Apr. 15, 1997).

³ *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order (rel. September 20, 1996) ("Payphone Order"); Order on Reconsideration (rel. Nov. 8, 1996) ("Reconsideration Order") (both orders together "Payphone Orders").

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I. INTRODUCTION

The RBOCs, in a mischaracterization of Telco's and Excel's arguments, claim that the Applications for Review are both procedurally improper and lacking in merit. The RBOCs are wrong on both accounts. First, Telco and Excel have been participating in Docket No. 96-128, the Payphone proceeding, which is the underlying proceeding from which the Bureau granted the waivers at issue. Second, the RBOCs launch detailed arguments as to why they and other LECs legitimately misunderstood the Commission's Payphone Orders and therefore, why they required more time to file both their federal and state tariffs. Telco and Excel do not attempt to second guess the RBOC's misunderstanding of the Commission's federal and state tariffing requirements and do not object to giving the LECs additional time to file their federal and state tariffs. Telco's and Excel's objection, however, is to the Bureau's allowing the LECs to receive interim compensation from interexchange carriers prior to their compliance with the Commission's requirements specified in the Payphone Orders. If the LECs misunderstood the Commission's Payphone Orders, the interexchange carriers should not be penalized by being required to pay to the LECs millions of dollars in compensation for a period of time in which the LECs were not in compliance with the Commission's Orders.

II. The Applications for Review are not Procedurally Defective

Section 1.115 of the Commission's rules, 47 C.F.R. § 1.115 states, "[a]ny person filing an application for review who has not previously participated in the *proceeding* shall include with the application a statement describing with particularity the manner in which he is aggrieved by the action taken and showing good reason why it was not possible for him to participate . . ." (emphasis added). In this instance, the waivers were both granted pursuant to Docket No. 96-128, which is the docket established for the Payphone proceedings. The Bureau did not establish a separate docket for the

waiver requests, nor did it issue a public notice nor in any manner inform interested parties that it was considering such a request. Accordingly, the *proceeding* in this instance is the Payphone proceeding, Docket No. 96-128.

As Telco and Excel noted in their respective Applications for Review, both companies participated in Docket No. 96-128. Telco submitted comments to the Commission regarding the comparably efficient interconnection ("CEI") plans filed by Bell Atlantic, NYNEX, Southwestern Bell, U S West, Pacific Bell and Nevada Bell as requested by earlier orders in this docket.⁴ Excel filed initial comments in response to the Commission's Notice of Proposed Rulemaking, released on June 4, 1996.⁵

However, if the Commission determines that the proceedings at issue are the specific waiver requests, Excel and Telco did not participate in the earlier stages *because they were unaware that the Bureau was contemplating such requests*. As noted earlier, the Bureau never issued a Public Notice on the waiver requests, nor gave interested parties any formal indication that it was considering such action. Indeed, the Waiver Orders themselves state that the Bureau took this action "on its own motion" and indicated that it considered the waiver requests through a series of *ex parte* correspondence from the RBOCs. Excel and Telco did not participate at those stages because the Bureau failed to issue any notice to interested parties before releasing its Waiver Orders. Accordingly, the Applications for Review are not procedurally improper. Both Excel and Telco

⁴ See, e.g., *Comments of Telco Communications Group on Bell Atlantic's CEI Plan*, CC Docket No. 96-128 (filed Feb. 7, 1997). Comments on the CEI plans filed by Southwestern Bell, NYNEX and U S West were also filed on February 7, 1997. Comments on the CEI plan of Pacific Bell and Nevada Bell were filed on February 12, 1997.

⁵ See *Comments of Excel Telecommunications*, CC Docket No. 96-128 (filed July 1, 1996).

participated in the underlying proceeding involving the waivers. Moreover, the Bureau's lack of a Public Notice as to the waivers constitutes "good reason" as to why Telco and Excel did not inform the Bureau of its position prior to release of the Waiver Orders.

III. The RBOCs Should Not Receive Interim Compensation for the Waiver Period

The RBOCs next go into lengthy explanations as to why they misunderstood the Commission's Payphone Orders on both the federal and state tariffing requirements. As to the federal tariffing requirement, the RBOCs argue that their reading of the requirement as very limited was reasonable. The RBOC's claim that the clarification opted for a more expansive interpretation of the Commission's Payphone Orders by requiring LECs to tariff payphone specific network features and functions that are provided to other PSPs, which they had not contemplated was required.⁶ Similarly, the RBOCs claim that they genuinely did not realize that the state tariffing obligations included compliance with the "new services test."⁷ According to the RBOCs, despite the fact that the Commission's Payphone Orders specifically reference the "new services test," they believed that because payphone services are already existing, they would not have to comply with that test when filing their state tariffs.⁸ The RBOCs contend that Excel and Telco have erroneously insinuated that the RBOC's misunderstanding of the requirements was feigned and that they legitimately misunderstood the Commission's orders.

Contrary to the RBOC's claims, Excel and Telco believe that the issue of whether the RBOC's misinterpretations were genuine are largely irrelevant. It would be futile for Excel and Telco

⁶ RBOC Comments at 7.

⁷ RBOC Comments at 12.

⁸ RBOC Comments at 13.

to engage in a debate as to whether the RBOCs actually misunderstood the parameters of the tariffing requirements or whether they are feigning ignorance to allow them to receive millions of dollars in compensation before they have complied with the Commission's Orders. Nevertheless, Excel and Telco believe that the interexchange carriers should not be required to pay the penalty for the RBOC's misinterpretations whether genuine or invented.

The Commission's Order on Reconsideration was released on November 6, 1996. In that Order, the Commission stated that LECs will be eligible for compensation like other PSPs when they have "completed the requirements for implementing our payphone regulatory scheme to implement Section 276."⁹ Included were the following requirements for the LECs: (1) have effective interstate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate subsidies; (2) have effective intrastate tariffs for basic payphone services; and (3) have effective intrastate and interstate tariffs for unbundled functionalities associated with those lines.¹⁰ The Commission made it abundantly clear that these three requirements must be satisfied before the LECs would be eligible for compensation from interexchange carriers. The Commission stated, "we must be cautious . . . to ensure that LECs comply with the requirements we set forth in the Report and Order."¹¹

If the RBOCs were not clear on the specifics of the federal and state tariffing requirements, they had plenty of time to resolve their confusion. The Commission plainly placed the burden on the RBOCs to satisfy the Commission's requirements. Notwithstanding this requirement, the RBOCs did

⁹ Reconsideration Order at ¶ 131.

¹⁰ *Id.*

¹¹ *Id.*

not seek clarification of its obligations until shortly prior to the deadline. The earliest *ex parte* communication from the RBOCs referenced in the Bureau's Waiver Orders occurred on March 19, 1997, less than one month before they could potentially be eligible for interim compensation. While the Bureau may have reasonably decided that the RBOCs and other LECs needed additional time to file their respective tariffs, the interexchange carriers should not be penalized for the RBOC's delay in clarifying their reading of the Payphone Orders. If the RBOCs failed to comply with the Commission's tariffing requirements by April 15, 1997, according to the Commission's Payphone Orders, they should not be permitted to receive interim compensation from interexchange carriers until they are in compliance.

Moreover, the RBOC's claims that all subsidies were removed from their tariffs and that they would provide credit for monies received over what was required under the "new services test" is unpersuasive. The tariffing requirements were implemented not just to require the LECs to eliminate subsidies, but to ensure that LECs would not act anticompetitively. As the LECs fail to note, APCC challenged the grant of the April 4, 1997, waiver, claiming that the waiver would allow LECs to act in a discriminatory manner.

IV. The Bureau Improperly Applied the Commission's Settled Waiver Standards

As stated by the RBOCs, under Section 1.3 of the Commission's rules, 47 C.F.R. § 1.3, the Commission may waive any rule for "good cause" shown. However, contrary to the RBOC's claims there plainly was no "good cause" justifying a waiver in this situation. First, the RBOCs contend that special circumstances existed in this situation because the LECs had reasonably relied in good-faith on a reading of the Commission's orders. A difference in interpretation should hardly be considered "special circumstances." Certainly every Commission order or ruling is subject to varying

interpretations. There is nothing “special” about the RBOCs interpreting a requirement that applies to them more narrowly than was actually intended. However, it was the RBOC’s responsibility in this situation to comply with the Commission’s requirements by April 15, 1997. If clarification was required, that clarification should have been sought well before several weeks prior to the deadline for compliance. The fact that the clarification came just 11 days before the deadline was due to the RBOC’s delay in seeking clarification.

Moreover, the RBOC’s claim of hardship from denial of the waivers is ludicrous. The Commission’s Payphone Orders never promised the RBOCs interim compensation by April 15, 1997. The Orders were clear that interim compensation would *only be permitted upon the LEC compliance with the specified requirements*. Accordingly, the RBOCs should have been well aware that they could not rely on interim compensation definitely beginning on April 15, 1997.

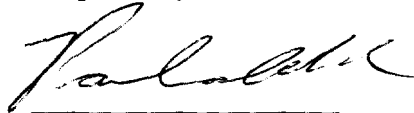
Finally, granting the RBOCs the requested waivers is at odds with the policy noted by the Commission. In its Reconsideration Order, the Commission clearly noted that the LECs must comply with the requirements set forth in the Payphone Order prior to receiving compensation from the interexchange carriers. Allowing the RBOCs to receive compensation prior to full compliance could potentially have anticompetitive ramifications on the payphone industry. As the Commission stated, “by implementing safeguards, we intend to ensure that LECs cooperate fully in the provision of any necessary payphone services and do not otherwise restrain competition”¹²

¹² Payphone Order at ¶ 14.

V. CONCLUSION

For the foregoing reasons, Telco and Excel urge the Commission to reverse the Bureau's decision to allow the LECs to receive interim compensation from the interexchange carriers prior to compliance with the Commission's requirements. As demonstrated above, the Bureau's decision does not conform with the Commission's own statements on this issue nor the policy rationales underlying the Commission's Orders in this docket. While the LECs may have required additional time to comply with the tariffing requirements, the interexchange carriers should not be penalized for their misinterpretation of the Commission's Payphone Orders.

Respectfully submitted,



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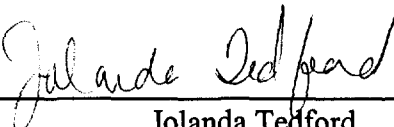
CERTIFICATE OF SERVICE

I, Jolanda Tedford, hereby certify that a copy of the foregoing **Reply Comments of Telco Communications Group, Inc. and Excel Telecommunications On Their Applications for Review, CC Docket No. 96-128** was sent to each of the following parties by hand delivery and regular mail (denoted with asterisk) on this 15th day of August, 1997.

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